Nos. 92-484 and 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

STEPHEN L. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

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REPLY BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

This case principally presents an issue of statutory construction, namely, whether Congress enacted Section 92 in 1916 as an amendment to the Federal Reserve Act or as an amendment to Section 5202 of the Revised Statutes. All the parties before the Court agree that the answer to that question resolves whether Section 92 remains in force.[1]

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[1] *See, e.g.*, U.S. Br. 14-18; Pet. Br. 11-15; Resp. Br. 14-20; *see also* American Bankers Association Br. 4-20.

In our opening brief, we pointed out that the court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753. *See* Pet. App. 7a-8a, 67a-72a.[2] In the court's view, this punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. We then explained that the court's analysis of the quotation marks was mistaken. All the available evidence—the language, structure, and subject matter of the statute—demonstrates that Congress enacted Section 92 as an amendment to the Federal Reserve Act and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act. *See* Pet. Br. 11-31; *accord* U.S. Br. 14-32.

Despite the length of their submission, respondents principally defend the court of appeals' judgment on the proposition that the punctuation contained in the text of the enrolled bill and the Statutes at Large is decisive. *See* Resp. Br. 8, 14-22. Respondents also latch onto Congress's use of the prefatory phrase in the 1916 Act that Section 5202 "'is hereby amended so as to read as follows.'" Resp. Br. 17 (quoting 39 Stat. 753). Respondents thus chastise petitioners for asking the Court both to "ignore the punctuation Congress chose" and "Congress' express statement in the 1916 Act that it was *amending* Rev. Stat. § 5202." Resp. Br. 9 (emphasis in original).[3]

[2] "Pet. App." refers to the appendix to the petition filed in No. 92-484.

[3] Such criticism is wide of the mark. First, there is affirmative evidence—all of which respondents ignore—that the drafters of Section 92 did not intend the quotation marks to have any interpretive significance. *See* Pet. Br. 16-19; U.S. Br. 20-22. Second, Congress did not amend Section 5202 in 1916—in amending Section 13 of the Federal Reserve Act at that time, Congress merely restated verbatim a portion of the 1913 Act that had previously referred to amending Section 5202. *See* Pet. Br. 14-15, 21-22; U.S. Br. 18-19.

As shown below, this Court's precedents, well-established principles of statutory construction, and common sense call for rejecting respondents' invitation to misinterpret Congress's actions in enacting Section 92.

Lastly, despite respondents' assertions to the contrary, *see* Resp. Br. 41-49, the court of appeals should not have even had the opportunity to construe Section 92 erroneously out of existence.

I. SECTION 92 REMAINS IN FORCE

A. The Language, Structure, And Substance Of The 1916 Act Show That Congress Enacted Section 92 As Part Of The Federal Reserve Act Of 1913

At the outset, respondents' attempt to frame the issue before the Court as hinging on "separation of powers principles" needs to be put to rest. *See* Resp. Br. 11-14. Despite respondents' rhetoric, this case does not call for the Court "to enact, amend or repeal laws—on policy or other grounds." Resp. Br. 12. To the contrary, as this Court has recently reiterated, "'[i]n ascertaining the plain meaning of [a] statute, the court must look to the particualar statutory language at issue, as well as the language and design of the statute as a whole.'" *McCarthy v. Bronson*, 111 S. Ct. 1737, 1740 (1991) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). "[D]eciding what a statute means," the Court has recognized, is "the quintessential judicial function." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983). In other words, this case calls for the Court to exercise the "judiciary['s] . . . final authority on issues of statutory construction." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

1. A close look at the language of the 1916 enactment confirms that Congress intended to add what became

Section 92 to Section 13 of the Federal Reserve Act of 1913, not to Section 5202 of the Revised Statutes. As both the United States and we have explained, the references to "this Act" in the paragraphs of Section 13 of the Federal Reserve Act preceding and following the reference to Section 5202 confirm that Section 92 was not enacted as part of Section 5202. *See* U.S. Br. 15-18; Pet. Br. 12-13. Respondents agree that "this Act" refers to the Federal Reserve Act, but argue that such a reference does not place Section 92 within the Federal Reserve Act. Resp. Br. 27-28.

Respondents' argument fails to come to grips with the components of the 1916 enactment, namely, the precise language of the 1913 Act which had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. That amendment to Section 5202 of the Revised Statutes, by necessity, referred to the "Federal Reserve Act." Pet. App. 80a. By contrast, the concluding paragraph of the 1913 Act, which concerned Federal Reserve bank rediscounts of bills and acceptances, referred expressly to "this Act," namely, the Federal Reserve Act. *See* Pet. App. 80a. That concluding paragraph, which was obviously part of the Federal Reserve Act, appears in the 1916 enactment immediately preceding the reference to Section 92. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 70a (paragraph 8). The reference to "this Act" in the rediscount provision (paragraph 8)—a part of the Federal Reserve Act—confirms that the Section 5202 reference had ended.

Seeking refuge in the statutory text, as opposed to relying solely on punctuation, respondents contend that "the language of the remaining text would unambiguously place Section 92 within Rev. Stat. § 5202" because Congress used certain prefatory phrases as "signposts" within the 1916 Act. Resp. Br. 24. Because Section 92 is not preceded by a separate prefatory phrase, respondents argue, Section 92 is part of Section 5202, which is preceded by the phrase "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." Pet. App. 70a; *see* Resp. Br. 24-25. Respondents overlook the fact that such prefatory language appeared initially in Section 13 of the 1913 Act, where Congress had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. In order to amend Section 13 in 1916, Congress simply restated that provision of the Federal Reserve Act in its entirety, including the portion of the 1913 Act that had referred to amending Section 5202. *See* Pet. App. 70a, 79a-80a. What respondents deem a signpost is actually a remnant of the previous legislation.[4]

That point is confirmed by Congress's amendment in 1916 to the Federal Reserve bank rediscount authority established by Section 13 of the Federal Reserve Act—an authority established by the Federal Reserve Act that applies only to Federal Reserve banks, not to member

[4] Respondents assert that in *Posadas v. National City Bank*, 296 U.S. 497 (1936), this Court concluded that the 1916 Act amended Section 5202 of the Revised Statutes. Resp. Br. 25. *Posadas* cannot bear the weight respondents would have it carry. There, in construing Section 25 of the Federal Reserve Act, the Court stated in passing that the 1916 Act "amends," among other provisions, "§ 5202 of the Revised Statutes." *Posadas v. National City Bank*, 296 U.S. at 502. In *Posadas*, the Court had no occasion to scrutinize the relevant statutory language and its history. In such circumstances, the Court's statement, although understandable, is scarcely authoritative of the issue presented here.

Respondents assert that *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), supports their "signpost" theory because the Court "relied on a similar analysis of Congress' use of quotation marks and introductory phrases." Resp. Br. 19. In that case, however, the Court determined congressional intent by relying on the language of the two statutes at issue, the pertinent legislative history, and the "title of the whole Robinson-Patman Act." *See* 355 U.S. at 378-382. That is precisely what petitioner and the United States are requesting the Court to do here.

banks or national banks. That provision appears in the 1913 Act after the reference to Section 5202. By its terms, that provision belongs in the Federal Reserve Act. *See* 38 Stat. 264; Pet. App. 80a. In 1916, Congress amended that Federal Reserve Act authorization to include authorizations for discount and purchase, including those for "foreign bills of exchange, and of acceptances authorized by this Act." 39 Stat. 753; Pet. App. 70a. In other words, in 1916 Congress was amending the Federal Reserve Act, not Section 5202.[5]

2. Respondents next assert that petitioners "seek to use the title of the 1916 Act to create ambiguity, because the title did not specifically mention that Rev. Stat. § 5202 was being amended." Resp. Br. 28. The statutory language and confusing punctuation—not the title—give rise to ambiguity and the need for statutory construction. *See, e.g.*, Pet. Br. 11-15; U.S. Br. 14-15. The title of the 1916 enactment, "An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen," 39 Stat. 752; Pet. App. 67a, describes precisely what Congress sought to accomplish. For that reason, the statute's title is a legitimate "aid in resolving an ambiguity in the legislation's text." *INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991) (citations omitted); *see Brotherhood of R.R. Trainmen v. Baltimore & O.R.R. Co.*, 331 U.S. 519, 529 (1947) (titles "are but tools available for the resolution of a doubt").[6]

[5] In the 1916 Act, that Federal Reserve Act authority (paragraph 8) appears in between the reference to Section 5202 and the reference to Section 92. Since that authority is undoubtedly a part of the Federal Reserve Act, it would make little sense to assume that the paragraph following it, Section 92, somehow should be treated as part of a wholly independent provision, Section 5202 of the Revised Statutes.

[6] Indeed, the titles of other statutes enacted during the period at issue show that when Congress intended to amend a section of the Revised Statutes as well as a provision of the Federal Reserve Act, Congress reflected that intent in the title. *See, e.g.*, Act of Sept. 26, 1918, ch. 177, 40 Stat. 967; Act of Mar. 3, 1919, ch. 101, 40 Stat. 1314; *see* U.S. Br. 18. Respondents dispute such a practice, citing the fact that neither the title to the 1913 Federal Reserve Act nor the title to the 1918 War Finance Corporation Act, both of which amended Section 5202 of the Revised Statutes, mentioned such an amendment. *See* Resp. Br. 29 & n.30. Each of those titles, however, contained a general description of the legislation's purpose. Those titles did not purport to specify which statutory provisions were being revised—the convention adopted by the 1916 enactment, and those previously cited.

3. In light of the above, respondents' reliance on the placement of punctuation cannot be squared with this Court's instruction to lower courts, when construing statutes, to "disregard the punctuation, or . . . repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932).[7] Moreover, respondents seek to distance themselves from the "comma cases," asserting that those cases involved confusing statutes, "susceptible of differing interpretations." Resp. Br. 23.[8] But that is precisely what is at issue here. Those cases—like this one—involved language made confusing by the inadvertent placement of punctuation. For that reason, this Court has long recog-

[7] Respondents attack as "obviously hyperbole" (Resp. Br. 23) the Court's remark in *Shreveport* that "[p]unctuation marks are no part of an act." 287 U.S. at 82. That attack is beside the point, as neither petitioner nor the United States has made such a claim here.

[8] *See, e.g., United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932); *Crawford v. Burke*, 195 U.S. 176, 192 (1904); *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837); *Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917).

Respondents attempt summarily to dismiss *Taylor v. United States*, 495 U.S. 575, 581-99 (1990), because it "does not involve punctuation at all." Resp. Br. 22 n.24. That effort is feeble. In *Taylor*, this Court construed the statute to include an entire provision—the statutory definition of burglary—despite the fact that Congress had previously repealed that provision when it had amended the statute.

nized that "[p]unctuation is a most fallible standard by which to interpret a writing." *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837).[9]

Respondents assert that "[t]his case is remarkably similar" to *In re Schilling*, 53 F. 81 (2d Cir. 1892). Resp. Br. 23. In that case, the court of appeals—faced with statutory language made confusing by punctuation—resorted to the legislative history. In particular, the court examined the statute as it was "reported to the two houses by the conference committees" to determine "the intent of the statute." 53 F. at 83. *Schilling*, contrary to respondents' assertion, supports petitioners' construction of the statute at issue here. As is apparent from the available legislative record, *see* Pet. Br. 16-19; p. 9, *infra*, Congress did not intend for the quotation marks to have any significance in interpreting the statute, and thus the placement of the punctuation in the final printed version of the 1916 enactment should not control over evidence in the text that Congress placed Section 92 in the Federal Reserve Act, not in Section 5202 of the Revised Statutes.

4. Respondents all but ignore the available legislative record surrounding the enactment of Section 92. That is not surprising because the legislative record undermines respondents' analysis of the statute. The Senate passed the bill proposing Section 92 after the Committee on Banking and Currency had deliberately omitted the quotation marks. *See* H.R. 13391, 64th Cong., 1st Sess. § 13 (1916) (Pet. Ldg. 31-48); *see also* Pet. Ldg. 11-29. All

[9] Respondents state that "[p]unctuation can be a critical element in discerning the meaning of a statutory phrase." Resp. Br. 23. That statement is unexceptionable, but the cases respondents cite do not support it. In *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989), the Court relied on punctuation only to confirm its interpretation based on the statutory text. Similarly, in *United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979), the Court explained that punctuation, although not decisive, can "reaffirm conclusions drawn from the words themselves."

the subsequent House, Senate, and Conference Committee versions of the bill either had no quotation marks, or quotation marks only at the beginning of each paragraph—thus making clear that Section 92 was part of the Federal Reserve Act, not Section 5202 of the Revised Statutes. *See* Pet. Br. 17-18 & n.21. It was only in the versions reprinted in the House and Senate records—after the Conference Committee's final marked-up version had been approved—that the inadvertent clerical insertion of the current, confusing quotation marks appeared. *See* Pet. Br. 18 & n.22.

The actions by the Senate committee, the Senate, the House, and the Conference Committee regarding the quotation marks, contrary to respondents' assertion, are "relevant express statement[s] of Congress' intent." Resp. Br. 32. As is apparent, the inadvertent quotation marks appeared later in the versions reprinted in the House and Senate records. In other words, such a clerical insertion, or error, in view of the context outlined above, may not change the substance of Congress's intended enactment. Indeed, the drafting history of this legislation confirms the wisdom of one court's recognition that "[t]he presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly fortuitous that it is a wholly unsafe aid to statutory interpretation." *Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917).[10]

Respondents assert that the so-called "enrolled bill doctrine" precludes this Court from considering the pertinent legislative record. *See* Resp. Br. 20-22. Contrary to respondents' argument, that "doctrine" does not involve

[10] Respondents ask this Court, in the name of plain meaning, to disregard the legislative record. *See* Resp. Br. 31-32. As set forth above, this is not such a case. Accordingly, this Court should use all appropriate extrinsic aids to statutory construction. *See Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444 (1955).

the sort of statutory construction question at issue here. Instead, the discrete principle simply calls for courts to respect the validity of all bills authenticated as having passed Congress and as having been signed by the President. The principle protects against the possibility that "the speaker of the House of Representatives and the President of the Senate . . . [might] impose upon the people as a law a bill that was never passed by Congress." *Marshall Field Co. v. Clark*, 143 U.S. 649, 672 (1892).

Indeed, this Court's recent decision in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), succinctly explains why the "enrolled bill doctrine" is not at all relevant here:

> [*Marshall Field & Co. v. Clark*] concerned "the nature of the evidence" the Court would consider in determining whether a bill had actually passed Congress. Appellants had argued that the constitutional Clause providing that "[e]ach House shall keep a Journal of its Proceedings" implied that whether a bill had passed must be determined by an examination of the journals. The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments' demands that the courts accept as passed all bills authenticated in the manner provided by Congress."

Id. at 391-92 n.4 (citations omitted).

Here, petitioner is not suggesting that the 1916 Act was not the bill passed by Congress. Nor is petitioner asking this Court to stray from the four corners of the enrolled bill and rewrite the 1916 Act. Rather, petitioner is asking this Court to examine the language of the enactment, using the available legislative record as an aid to construction. Neither the "enrolled bill doctrine" nor

common sense precludes such an exercise of statutory interpretation. *See Fex v. Michigan*, 113 S. Ct. 3085, 1089 (1993) ("resolution of the [statutory] ambiguity is readily to be found in what might be called the sense of the matter, and in the import of related provisions").

5. Respondents next criticize petitioner for entering a "foray into the 'substance' of federal banking law." Resp. Br. 29. In respondents' view, since Section 5202 concerns national banks and Section 13 concerns the powers of Federal Reserve banks, then Section 92, which concerns national banks, properly belongs within Section 5202.

First, consideration of the subject matter of the statutes at issue is scarcely revolutionary. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158-64 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-56 (1987). Second, respondents' superficial distinction overlooks the substance of each of these provisions. Congress enacted Section 5202 during the Civil War to prevent excess indebtedness of national banks. Decades later, Congress enacted the Federal Reserve Act of 1913 to establish centralized federal banking authority, thereby creating the Federal Reserve banks and also regulating national banks by requiring them to become members of the Federal Reserve system. In particular, Section 13 of the Act set forth the several powers of Federal Reserve banks, such as the authority to accept, discount, and rediscount various forms of notes and commercial paper, including those issued by national banks. *See* 38 Stat. 263-64; Pet. App. 77a-79a. Congress's placement of Section 92 in the broader Section 13, rather than in the narrower Section 5202, is thus understandable. Common sense dictates that Congress would have placed Section 92 in the Federal Reserve Act instead of Section 5202 because Section 5202 is a discrete provision of the original National Currency Act that dealt exclusively with limits on indebtedness of national banks. Congress would have no reason to tack onto this provision the entirely distinct

subject matter of Section 92—insurance agency and real estate brokerage powers of national banks.[11]

B. Congress Did Not Repeal Section 92 By The 1918 War Finance Corporation Act

Turning to the 1918 War Finance Corporation Act, respondents offer no plausible basis for assuming that Congress had any intention of repealing the national bank insurance authority it had adopted in 1916. Nonetheless, respondents argue that this is not a case of a disfavored implied repeal because the 1918 Act expressly provided "[t]hat all provisions of any Act or Acts inconsistent with the provisions of [the 1918] Act are hereby repealed." Resp. Br. 18 (internal quotation marks and citations omitted; brackets in original).[12]

That argument is makeweight. National bank insurance authority is scarcely "inconsistent" with the financing efforts engendered by the War Finance Corporation Act. It is thus understandable that Congress made no mention of Section 92 during its consideration of the 1918 Act. Accordingly, in the face of that legislative record, there is no basis for assuming that Congress, by enacting the War Finance Corporation Act in 1918, had

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[11] Respondents suggest that since then-Comptroller Williams initially proposed Section 92 as an amendment to the National Bank Act, it is more likely that Congress enacted that provision as part of Section 5202 of the Revised Statutes. Resp. Br. 30-31. The contemporaneous legislative record, however, shows that Congress proposed to add Section 92 as an amendment to the Federal Reserve Act, not to Section 5202 of the Revised States, and thus did not follow the Comptroller's proposal. *See* Pet. Ldg. 18 (Congress did not place any quotation marks in that aspect of the original bill containing the amendment adding Section 92).

[12] Time and again, this Court has adhered to "[t]he cardinal rule . . . that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *see Morton v. Mancari*, 417 U.S. 535, 549 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

any intention of repealing the national bank insurance authority it had adopted two years before.[13]

C. The Uniform Consideration By The Pertinent Authorities Regarding The Validity Of Section 92 Is Entitled To Considerable Weight

Finally, respondents contend that "there is no support for deferring to the views of the Comptroller or Federal Reserve Board as to Section 92's placement or repeal." Resp. Br. 34. That contention is meritless, given the premise that there is at least ambiguity in the texts of the relevant statutes. *See, e.g.*, Pet. Br. 26-27; U.S. Br. 31-32. As this Court has recognized:

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry out its provisions into effect, is entitled to very great respect.

Edwards's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827); *accord Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).[14]

Both the Comptroller and the Federal Reserve Board, in contemporaneous compilations of pertinent banking statutes, set forth Section 92 as part of the Federal Reserve Act, and clarified its placement by changes to the inadvertent quotation marks. *See* Pet. Br. 27. The Comptroller reprinted Section 92 along with the entire 1916 Act, but without the confusing punctuation (like the Senate version of the bill). *See* S. Doc. No. 412, 64th Cong., 1st Sess. 136-37 (1917); *see also* S. Doc. No. 216,

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[13] Moreover, as the United States has pointed out, neither Senator Owens, Section 92's principal sponsor, nor Comptroller Williams, each of whom retained their positions, made any comment in the pertinent legislative record that suggested that Congress was ever considering a repeal of Section 92. *See* U.S. Br. 24-25.

[14] Respondents do not address either of these applicable governing precedents.

66th Cong., 2d Sess. 146 (1920) (compilation prepared under the Comptroller's direction). The Federal Reserve Board's reprint of the 1916 Act in its *Third Annual Report* also places Section 92 in Section 13 of the Federal Reserve Act. *See Third Annual Report of the Federal Reserve Board* 135-36 (1917).[15] Moreover, in a post-1918 compilation, the Federal Reserve Board continued to show Section 92 as part of Section 13 of the Federal Reserve Act. *See* Federal Reserve Board, *The Federal Reserve Act As Amended* 30 (1919).

Respondents similarly seek to brush aside Congress's affirmative treatment of Section 92's existence. *See* Resp. Br. 38-41. As we previously pointed out, in 1982, for example, Congress amended an aspect of Section 92 unrelated to the insurance provision. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11. In 1987, Congress imposed a one-year moratorium on the expansion of insurance activities "pursuant to the Act of September 7, 1916 (12 U.S.C. 92)." Competitive Equality Banking Act of 1987,

[15] Contrary to respondents' suggestion, *see* Resp. Br. 35 n.36, the Federal Reserve Board distinguished Section 92 from the amendment to Section 5202 of the Revised Statutes in at least two ways. First, the paragraph containing the amendment to Section 5202 begins with quotation marks, with no quotation marks at the end of the preceding paragraph (like the House version of the bill). *See Third Annual Report of the Federal Reserve Board* 136 (1917); *compare* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 49-53). The Federal Reserve Board may have been attempting to clarify that all paragraphs following the amendment to Section 5202 refer back to the initial line without quotation marks, "[t]hat section thirteen be, and is hereby, amended to read as follows," and do not refer back to the paragraph amending Section 5202. Second, the Board's compilation uses italics to indicate any language changed from the previous text. In light of the placement of quotation marks in this compilation, the most natural reading of the italicized language is that it is exclusively the language amending Section 13. In other words, Section 92—appearing in italics—is an amendment to Section 13.

Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583.[16] And in 1991, Congress considered—but did not enact—legislation that would have substantially amended Section 92 and curtailed national banks' insurance activities.[17]

In these circumstances, the Court's statement in *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980), is particularly apt:

> [W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight, . . . and particularly so when the precise intent of the enacting Congress is obscure.

Id. at 596 (citations omitted).

II. THE COURT OF APPEALS ERRED IN DETERMINING WHETHER SECTION 92 REMAINS IN FORCE

1. Respondents contend that the court of appeals properly reached out to decide whether Section 92 remains in force because that issue falls within the well-established "plain error" doctrine. *See* Resp. Br. 43-45 & n.50. In so contending, respondents suggest that Section 92's "'nonexistence is apparent on the face of things.'" Resp. Br. 45 n.50 (quoting *United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring)). The so-

[16] In imposing that moratorium, Congress did not at all question the validity of Section 92. *See, e.g.*, S. Rep. No. 19, 100th Cong., 1st Sess. 17 (1987) ("Existing law authorizes a national bank 'located and doing business in any place the population of which does not exceed five thousand inhabitants' to act as an insurance agent. The scope of that authority is currently in dispute.").

[17] *See* H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 1, at 81-82, 192 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 4, at 56-57, 154 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); S. Rep. No. 167, 102d Cong., 1st Sess. 170-71, 480 (1991) (describing proposed § 771 of S. 543, 102d Cong., 1st Sess. (1991)).

called "nonexistence" of Section 92, however, was not even apparent to respondents before the issuance of the decision below, *see* Pet. App. 24a, nor was it apparent to federal courts, including this Court, Congress, or the pertinent regulatory authorities. *See* Pet. Br. 26-30. Indeed, the continuing validity of Section 92 had understandably remained unchallenged in—and had even been ratified—by the reported case law. Moreover, the court of appeals itself acknowledged that the statutory analysis confirming Section 92's validity is "plausible." Pet. App. 17a.[18] In these circumstances, the "plain error" doctrine does not sanction the court of appeals' decision.[19]

2. Respondents also contend that "there was no Article III bar to the court of appeals' decision" because the court decided "an Article III case or controversy" between the parties. Resp. Br. 42-43. The case or controversy before the court of appeals, however, did not include any disagreement over the existence of Section 92. During oral argument before the court of appeals, respondents' counsel stated that "we cannot advance a substantial argument that section 92 no longer exists." Pet. App. 24a. The record thus shows that the parties reached the same conclusion that Section 92 remained valid. That

[18] For these reasons, respondents err in relying on *Arcadia, Ohio v. Ohio Power Co.*, 111 S.Ct. 415 (1990), where this Court resolved the case on a ground not advanced by any party, *i.e.*, that Section 318 of the Federal Power Act was inapplicable, as opposed to what happened here, *i.e.*, a court's construing an otherwise plausibly valid law out of existence.

[19] In defending the decision below, respondents mischaracterize the district court's passing reference that Section 92 remained valid law. Contrary to respondents' assertions, the district court did not attempt to reenact a repealed law, nor did the court decide "that the repealed statute might exert force, based on the power of opinion alone." Resp. Br. 47. Such a decision might have been subject to review as plain error. But the district court did no such thing. The court merely respected precedent and exercised judicial restraint.

agreement, contrary to respondents' suggestion, is not tantamount to putting the underlying question of law "in controversy." Accordingly, as petitioner has pointed out, *see* Pet. Br. 34-35, this Court's decisions in *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982), and *Williams v. Zbaraz*, 448 U.S. 358, 367 (1980), cannot be swept aside.[20] In sum, as the validity of Section 92 was affirmatively uncontested, that issue should have remained undecided.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[20] Respondents mistakenly rely on *Town of South Ottawa v. Perkins*, 94 U.S. 260 (1877), as authority for asserting that the issue of Section 92's validity was properly before the court of appeals. *See* Resp. Br. 45-46. In *Perkins*, this Court rejected an application of the doctrine of estoppel to the specific issue of whether a state legislature had enacted legislation authorizing the issuance of bonds. *See* 94 U.S. at 266-67. Here, by contrast, there is no issue regarding whether Congress enacted Section 92 in 1916. Rather, the issue concerns the appropriate construction of the provision that Congress enacted.